SUPREME COURT, U. S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1342

SUN PROTECTION COMPANY OF AMERICA, *Petitioner*

v.

THE UNITED STATES OF AMERICA, *Respondent*

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

Sun Protection Company of America prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above case on January 19, 1968.

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OPINION BELOW

No opinion was filed by the United States District Court.

The opinion of the United States Court of Appeals for the Third Circuit appears in —— F.2d —— and at pp. —— to —— infra.

JURISDICTION

The judgment of the United States Court of Appeals was entered on January 19, 1968.

The jurisdiction of this court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Can a purchaser, who made the required deposit with a bid at a United States Marshal's sale of property upon a writ of execution, but was unable to complete the purchase, be charged with costs of maintenance and care of the property involved in the sale?

(Answered in the affirmative by the Court below.)

2. Under such circumstances, can the balance of the bid deposit be applied on account of the default judgment entered against the defendant?

(Answered in the affirmative by the Court below.)

STATEMENT OF THE CASE

The petitioner bid for the purchase of certain real estate and personalty belonging to Branch Coal Corporation which was exposed to public sale by the United States Marshal on April 23, 1965, pursuant to a default judgment entered in favor of the respondent, and against Branch Coal Corporation in the amount of $95,785.79. The amount of the bid was $80,000, and the petitioner posted the sum of $8,000 with the United States Marshal.

The petitioner was unable to complete the sale, and the said deposit was subsequently declared forfeited by Order of the Court below.

On October 29, 1965, the property in question was again exposed to public sale, and the property was purchased on that date by the Small Business Administration, an agency of the United States Government, for the sum of $25,000, which sale was confirmed by the Court on November 10, 1965.

On March 26, 1966, the said property was again exposed to public sale, and again sold to the highest bidder.

Various sums of money of this deposit made by the petitioner have been distributed by Order of the Court below covering the costs of advertising for the sale of the property on April 23, 1965, and for the advertising incurred in connection with the sale of the property on October 29, 1965, as well as reimbursement for certain taxes paid and monies expended in the care and preservation of the property. The balance of the said bid deposit money was, by Order of the Court below, paid to the Small Business Administration.

Petitioner opposed the award of any of the said bid deposit money for the payment of any items, except the costs of advertising for the first sale on April 23, 1965, and certain taxes. This was based upon the contention that no authority exists for the payment of the costs of maintenance and the care of the said property, and that the proceeds could not be applied on account of the judgment entered against the defendant.

The District Court denied petitioner's petition to show cause why the balance of the said bid deposit money, after deducting the costs of the advertisement for the first sale of said property on April 23, 1965, and certain taxes then due, should not be paid to the petitioner. Because of inadvertence in not advising the appellant of the entry of the Order of the Court below, the Order was, upon petition, vacated, and a new Order entered.

This appeal is from the re-entry of the Order denying petitioner's petitions for refund.

REASONS FOR GRANTING THE WRIT

I. *A purchaser who made a deposit upon a bid made at a sale of property upon a Writ of Execution, and who made the required deposit, but was unable to complete the purchase, cannot be charged with costs of maintenance and care of the property involved in the sale.*

The Order of the District Court of March 19, 1965 with respect to the sale stated that if the bidder does not "deposit

the entire balance of his bid with the Marshal within 30 days from the date of confirmation on or before June 5, 1965," ". . . his deposit shall be forfeited and be paid into the registry of the Court for satisfaction of costs incurred, and thereafter be applied against the judgment debt outstanding. . . . The buyer shall be responsible for all State, local or Federal transfer taxes or stamps . . ."

There is no question that advertising costs for the sale of the property on April 23, 1965 are included in said costs. The taxes referred to are transfer taxes. Since no actual transfer took place, no such taxes were paid.

The respondent has cited no authority for the application of the deposit money to the judgment against the defendant. Neither has respondent cited any authority for the application of the deposit money to the costs of maintenance and care of the property. The Order of the Court of May 19, 1965 makes no reference to costs of maintenance and care "of the property as an item for which a prospective purchaser was responsible."

With respect to the costs of advertising of the sale which was held on October 29, 1965, these costs are properly chargeable to the purchaser in this case, the Small Business Administration, and not to any prior bidder.

The position of the Sun Protection Company is that the liability of the deposit money was limited to the expenses incurred in advertising the sale scheduled for April 23, 1965, and any taxes paid (taxes referring to transfer taxes, which in this particular instance, does not apply since no actual sale took place). *Bayne v. Brewer Pottery Company*, 90 F. 622. There was there held that a purchaser of property at a judicial sale who failed to complete his bid could not be held for the difference between his bid and the price realized on a second sale nor for the costs of such resale unless he had notice that the second sale was to be made at his risk and the fact that by his purchase he became a party to the record did not charge him with such notice where there was no order that the sale should have been so made.

II. *The balance of the bid deposit cannot be applied on account of the default judgment entered against the defendant, Branch Coal Corporation.*

Sale of the said property was made pursuant to an Order of the Court below which, among other matters, provided the following:

> "2. The successful bidder shall be required to deposit with the Marshal in cash or a certified or cashier's check, a sum equal to 10 per cent of his total bid immediately upon the property being struck down to him. If he does not do so, the Marshal may at his discretion, immediately offer the property again for sale. The successful bidder shall deposit the entire balance of his bid with the Marshal within 30 days from the date of confirmation, or on or before June 5, 1965. If he does not do so, his deposit shall be forfeitted and be paid into the registry of the Court for "satisfaction of costs incurred and thereafter to be applied against the judgment debt outstanding, and all rights of the buyer in the said real estate and personal property shall cease and be immediately void. The buyer shall be responsible for all State, local or Federal transfer taxes or stamps."

The Order is without authority in law. The sale of the instant property was not a judicial sale but an execution sale, and is governed by the laws of the Commonwealth of Pennsylvania relating to the sale of real and personal property. Since the sale was conducted under the Order of the Court rather than under the laws of the Commonwealth of Pennsylvania pertaining to the sale of real estate and personal property, the said sale of April 23, 1965, was entirely void. *United States v. Weir*, 253 F. Supp. 306 (1963) Aff. 339 F. 2d 82.

Aside from the invalidity of the sale because it was conducted pursuant to an Order of the Court below, rather than under the laws pertaining to sales upon a Writ of

Execution of the Commonwealth of Pennsylvania, it is noteworthy to observe that the Order of the Court makes no reference to the consideration or deduction of costs of maintenance as items for which a prospective purchaser was responsible.

The Order of the Court of March 19, 1965 merely laid down the rules for the conduct of a sale of the defendant's property. However, basically, the sale of the defendant's property is governed by the law of the state where the property is located.

That this is so is evidenced by the petition filed by the government to fix the fair value of the real property sold in accordance with the Act of July 16, 1941, P. L. 400 Sect. 1, et seq. of the Commonwealth of Pennsylvania.

It must be remembered that the judgment entered in the above case was on a bond.

The Federal courts do not have unlimited powers in the sale of real or personal property. The sale of such property is governed by state law. Under state law the application of a forfeited bid is to be applied to the payment of advertising costs and taxes incurred. This is what the Decree of March 19, 1965 provided. Furthermore, there is no provision in the law for the application of the balance of any bid to be applied on the debt of the defendant in a sale of real estate.

The request for the payment of costs and for maintenance of the property is not itemized in any of the Government's petitions, so that no proper determination of what amounts are lawfully payable is clearly set forth.

The Order of the Court below allowing the Government's petition to pay to the Small Business Administration the balance of the proceeds of the said sale, and to pay to the United States Marshal any sum of money other than for advertising costs and any taxes paid, was in error, and should be reversed.

The decision of the court below, affirming the decision of the district court, is in conflict with the decision of the Court of Appeals of the eighth circuit in *Weir v. United*

States, supra, and for that reason certiorari should be granted to clarify the issue as to whether federal or state statutes apply to execution sales in federal cases.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JACOB J. KILIMNIK
Counsel for Petitioner

ALEXANDER OSINOFF
Of Counsel

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16515

UNITED STATES OF AMERICA

v.

BRANCH COAL CORPORATION,
A PENNSYLVANIA CORPORATION,

SUN PROTECTION COMPANY OF AMERICA,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued November 7, 1967

Before STALEY, *Chief Judge*, KALODNER and FORMAN, *Circuit Judges*.

OPINION OF THE COURT

(Filed January 19, 1968)

By STALEY, *Chief Judge*.

This is an appeal from an order of the United States District Court for the Eastern District of Pennsylvania directing distribution of the remainder of a 10% deposit made by appellant, Sun Protection Company of America

("Sun"), as the successful bidder at a public sale for the purchase of certain real estate and personalty belonging to Branch Coal Corporation (hereinafter "Branch Coal"). The purpose of the sale, which was conducted by the United States Marshal on April 23, 1965, was to satisfy, as far as possible, a default judgment entered in favor of the United States and against Branch Coal in the amount of $95,785.79.

The sale in question was conducted pursuant to an order of the district court dated March 19, 1965. Paragraph two (2) of this order provided:

> "The successful bidder shall be required to deposit with the Marshal . . . a sum equal to 10% of his total bid immediately upon the property being struck down to him. . . . The successful bidder must deposit the entire balance of his bid with the Marshal within 30 days from the date of confirmation or on or before June 5, 1965. If he does not do so, his deposit shall be forfeited and be paid into the registry of the Court for satisfaction of costs incurred and thereafter to be applied against the Judgment debt outstanding, and all rights of the buyer in the said real estate and personal property shall cease and be completely void. The buyer shall be responsible for all state, local or Federal transfer taxes or stamps."

In compliance with the district court's order, Sun, immediately after the property was sold to it for $80,000, deposited $8,000 (10% of the $80,000 sale price) with the Marshal. Sun, however, was unable to complete the sale, and its deposit was declared forfeit by order of court. The Branch Coal property was again exposed to public sale on October 29, 1965, and it was purchased on that date by the Small Business Administration, an agency of the United States Government, for the sum of $25,000.

Various sums of appellant's $8,000 deposit have been distributed by court order to cover the costs of advertising for the sale of the property on April 23, 1965, and for the advertising incurred in connection with the sale of Octo-

ber 29, 1965. Deductions were also made as reimbursement for certain taxes paid and monies expended in the care and preservation of the property; the balance of the bid deposit was, by order of the district court, paid to the Small Business Administration.

On this appeal, Sun contends that the sale of April 23, 1965, was entirely void because it was not conducted in accordance with the laws of Pennsylvania, but by order of court. It is urged that since state law should have been followed, appellant is only liable for those sums that would have been deducted from its forfeited bid under Pennsylvania law. Under the latter, appellant suggests that it would have been liable only for the costs of advertisement for the first sale on April 23, 1965, and certain taxes then due; the remainder of the deposit would have been returned.[1]

At oral argument, appellant advanced the theory that its position was bottomed upon the authority of Rule 69(a) of the Federal Rules of Civil Procedure. In part, Rule 69(a) provides:

> "Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in

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[1] Oddly enough, appellant has not referred the court to one Pennsylvania case that would support this contention. Indeed, at oral argument, counsel for appellant conceded that he knew of no Pennsylvania case that would prohibit the forfeiture of a 10% deposit upon failure to pay the remainder of the sale price.

Since we are of the view that Pennsylvania law is not dispositive of this appeal, it is unnecessary for us to delve deeply into it. However, we do note in passing that the Court of Common Pleas of Lackawanna County, in a situation somewhat similar to the present one, stated that upon default a purchaser at a judicial sale forfeits his earnest money. The court further said: ". . . [U]ntil defendant offers to comply with the terms of sale in effect he remains an optionee only. If he forfeits his option he forfeits his deposit. . . ." Callender v. Price, 87 Pa. D. & C. 501, 504 (1954).

accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable. . . ."

Concededly, Rule 69(a) has been interpreted as precluding the application of federal procedures, as outlined in 28 U. S. C. §§2001-2002 (1965), to execution sales. Weir v. United States, 339 F.2d 82 (C.A.8, 1964). However, we are aware of no decision that has construed Rule 69(a) as requiring an execution sale in every case where the United States is seeking to enforce a money judgment. Indeed, the first sentence of the Rule specificaly provides for alternate means of enforcement when the "court directs otherwise." The district court in the instant case directed that the sale of April 23, 1965, be held under judicial auspices; thus it was clearly a judicial sale rather than one held under a writ of execution.[2]

A judicial sale differs from an execution sale in that the former is conducted pursuant to directions of the court and the federal statutes. 28 U.S.C. §§2001-2007 (1965); Yazoo

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[2] Appellant seems to take comfort in the fact that, pursuant to the entry of judgment against Branch Coal, the Clerk of the district court issued a writ of execution directing the Marshal to levy upon and sell the Branch Coal property. Admittedly, the Marshal levied upon the property in accordance with the directions contained in the writ, but no execution sale was held. Instead, the United States Attorney applied for and received an order from the district court directing the Marshal to expose at public sale the real and personal property of Branch Coal.

It is clear from the record that the sale was held in compliance with the terms and conditions of the court's order. And although the procedure followed by the United States Attorney may have been somewhat unorthodox, appellant has not shown, nor could it, that the district court was without jurisdiction to order a judicial sale. The judgment in this case was rendered by the district court; that court had inherent power to enforce its judgment and use appropriate and effective process therefor. See United States ex rel. Riggs v. Johnson County, 73 U. S. (6 Wall.) 166 (1867).

& M. V. R. Co. v. City of Clarksdale, 257 U.S. 10 (1921); Prudential Ins. Co. of America v. Land Estates, Inc., 90 F.2d 457 (C.A.2, 1937). In Yazoo, the Supreme Court noted the distinction between judicial sales ". . . made under order or decree of the court and requiring confirmation by the court for their validity . . ." and execution sales "which issue by mere praecipe of the judgment creditor . . . and only come under judicial supervision on complaint of either party." 257 U.S. at 19.

There can be no doubt that Congress has authorized the federal judiciary to use sound discretion in setting the terms and conditions for judicial sales. Section 2001(a), 28 U.S.C., provides in part: "[a]ny realty or interest therein sold under any order or decree of any court of the United States shall be sold . . . upon such terms and conditions as the court directs." And section 2004 of the same title states, in pertinent part, that "[a]ny personalty sold under any order or decree of any court of the United States shall be sold in accordance with section 2001 . . . unless the court orders otherwise."

It is a well settled rule that, except in cases of abuse, appellate courts will not disturb the exercise of a district court's discretion in setting the terms and conditions for a judicial sale and the confirmation thereof. United States v. Heasley, 283 F.2d 422 (C.A.8, 1960); Bovay v. Townsend, 78 F.2d 343 (C.A.8, 1935); Revere Copper & Brass, Inc. v. Adriance Machine Works, Inc., 68 F.2d 708 (C.A.2, 1934). The district court in the instant case acted within its authorized discretion when it declared that the successful bider would forfeit his deposit if he should fail to complete the sale. The court's decree is controlling upon the parties, and their rights and obligations are fixed thereby. In re United Toledo Co., 152 F.2d 210 (C.A.6, 1945). We will not permit a successful bidder to impinge upon the integrity of his contract with the court, especially when the bidder's subsequent loss is occasioned solely by his own fault.

Lastly, appellant contends that the district court distributed a portion of its forfeited bid in a manner not au-

thorized by the order of March 19, 1965. We have examined the various distributions and we can find no error.

Accordingly the order of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1342

SUN PROTECTION COMPANY OF AMERICA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

1. On February 18, 1965, the district court entered a default judgment against the Branch Coal Corporation in favor of the United States for $95,785.79, the amount found due and owing on two secured loans made by the Small Business Administration.

On March 19, 1965, the district court entered an order directing the sale of certain real and personal property of Branch Coal to satisfy the debt (Pet. App. 9). That order stated that the property was to be sold on April 23, 1965, to the highest bidder. Paragraph 2 of that order directed as follows:

> The successful bidder shall be required to deposit with the Marshal in cash or by certified or cashier's check a sum equal to 10% of his total

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> bid immediately upon the property being struck down to him. If he does not do so, the Marshal may at his discretion immediately offer the property again for sale. The successful bidder must deposit the entire balance of his bid with the Marshal within 30 days from the date of confirmation or on or before June 5, 1965. If he does not do so, his deposit shall be forfeited and be paid into the registry of the Court for satisfaction of costs incurred and thereafter to be applied against the Judgment debt outstanding, and all rights of the buyer in the said real estate and personal property shall cease and be completely void. The buyer shall be responsible for all state, local or Federal transfer taxes or stamps.

Petitioner was the highest bidder at the April 23 sale, and pursuant to the district court's order, deposited $8,000 (10% of its $80,000 bid) with the Marshal (Pet. App. 9). When petitioner failed to complete the sale within the required time, the district court ordered that the property be resold on October 29, 1965, and directed that a portion of petitioner's deposit be paid out to cover advertising, taxes paid, and expenses incurred for the care and preservation of the property. The Small Business Administration purchased the property on October 29, for $25,000.

On May 11, 1966, the district court ordered that the remainder of petitioner's deposit ($3,949.22) be distributed to the Marshal ($538.45) to defray the costs of the second sale, and to the SBA ($3,410.77)

to be applied to its judgment.[1] The court of appeals affirmed that order, holding that the district court had authority to order a judicial sale of the property, and that, under federal law, the setting of terms for a judicial sale, including provision for a forfeiture, was within the court's discretion.

2. The decision below is plainly correct, and there is no occasion for further review by this Court.

Petitioner's principal argument is that the district court's order setting the terms and conditions of the April 23 sale is void because it did not comply with Pennsylvania law. But petitioner does not cite any Pennsylvania authority which would prohibit a forfeiture of its deposit. Accordingly, certiorari plainly would not be warranted because there is no showing that state law directs a result different from that reached below. Indeed the court below (Pet. App. 10 n.1) adverted to Pennsylvania authority which supports the district court's action.

Since the sale was a judicial, rather than an execution sale,[2] however, the court below correctly held that the conduct of the sale was governed by federal law, set out in 28 U.S.C. 2001 *et seq.* Under 28 U.S.C. 2001(a), real property disposed of in a judicial sale

[1] Because the order of May 11, 1966, was not received by petitioner, it was vacated and re-entered by the district court on January 18, 1967.

[2] This Court has noted the distinction between judicial sales, "made under order or decree of the court and requiring confirmation by the court for their validity," and execution sales "which issue by mere praecipe of the judgment creditor * * * without order of the court, * * * and only come under judicial supervision on complaint of either party." *Yazzoo & M.V.R.R. Co.* v. *Clarksdale*, 257 U.S. 10, 19.

shall be sold "upon such terms and conditions as the court directs."[3] The district court did not abuse its discretion under this statute either by providing for the forfeiture of the deposit of a purchaser who failed to complete the sale, or by applying that provision of the order to petitioner.

3. Contrary to petitioner's contention, the decision below is not in conflict with *Weir* v. *United States*, 339 F. 2d 82 (C.A. 8). That case merely holds that state procedures must be followed in *execution sales* under Rule 69(a), Fed. R. Civ. P.[4] And the opinion in *Weir* makes it clear that *judicial sales* are governed by the terms of the federal statutes, 28 U.S.C. 2001 *et seq.*, and not by state law (339 F. 2d 85–86).[5]

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MAY 1968.

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[3] As for personal property, 28 U.S.C. 2004 directs that it shall be sold "in accordance with section 2001 of this title, unless the court orders otherwise."

[4] Under Rule 69(a), execution sales are to be made "in accordance with the practice and procedure of the state in which the district court is held * * * except that any statute of the United States governs to the extent that it is applicable. * * *"

[5] We see no basis for petitioner's remaining contention (Pet. 3–4) that the order of March 19, 1965, cannot be construed as permitting use of its deposit for any expenses except those incurred in advertising the first sale. The order plainly contemplates that the entire deposit be "forfeited", and that it be used "for satisfaction of costs incurred and thereafter to be applied against the judgment debt outstanding * * *."

U.S. GOVERNMENT PRINTING OFFICE: 1968